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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE WARE,

Defendant and Appellant.

B200018

(Los Angeles County
Super. Ct. No. BA 317341)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mary H. Strobel, Judge. Affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Willie Ware appeals from his convictions on one count of possessing cocaine and one count of selling cocaine. Ware contends that (1) the prosecution impermissibly used a peremptory challenge to strike a prospective juror on racial grounds, and (2) the admission of evidence relating to laboratory reports (including the reports themselves) that were prepared by a criminalist who did not testify violated Ware's rights under the Confrontation Clause. We disagree with both contentions and affirm.

BACKGROUND

The amended information charged Ware with one count of selling cocaine in violation of Health and Safety Code section 11352, subdivision (a), and one count of possessing cocaine in violation of Health and Safety Code section 11350, subdivision (a). Ware pleaded not guilty. A jury convicted him on both counts. The court suspended imposition of sentence and placed Ware on three years of formal probation on condition that he serve 180 days in jail, and the court credited Ware with 168 days already served. The court also imposed certain other probation conditions and various statutory fines and fees.

The evidence introduced at trial showed the following facts: On February 14, 2007, a police officer using binoculars observed Ware and his codefendant, William Ellis, on a sidewalk in downtown Los Angeles. There was a black duffle bag on the sidewalk near Ware's left foot. A woman walked up to Ellis, spoke to him for one or two seconds, and gave him some money. Ellis put the money in his pants pocket, and Ware reached into his own shirt pocket, took out two off-white objects that appeared to be rock cocaine, and handed them to Ellis, who handed them to the woman. The woman briefly inspected the objects and then walked away. Officers detained Ware, Ellis, and the woman, and they searched the duffel bag. Laboratory analysis revealed that the objects Ellis gave the woman, as well as a substance found in the duffel bag, contained cocaine.

DISCUSSION

I. The Peremptory Challenge on Allegedly Racially Discriminatory Grounds

During voir dire, prospective juror 3 said that she had served on a criminal jury before and that the jury on which she had served had reached a verdict. The court asked her “How long ago was that, ma’am?”, and she replied “Maybe six years ago.” The court then asked “And do you remember what the charges were in that case?” She answered “No.” The court then asked “Do you remember if they were related to drug charges or drug sale?”, and she said “No.” The court followed up by asking “No, they were not?”, and she said “No, they were not.”

The prosecutor later exercised a peremptory challenge to strike prospective juror 3. Ware objected and, at a hearing outside the presence of the prospective jurors, presented the following argument: “Juror 3 is Black. Both defendants in this case are Black. The jury is not a typical – and I hate to say typical, because there is no such thing, but not a typical venire. I tried to count and got four or five Blacks out of a pool of 55. In the central district that is very low. [¶] And, therefore, I think that we are entitled to make a challenge to the challenge because of the limited number of Blacks on the jury and possibility it could be discriminatory, even if the prosecutor didn’t mean it as discriminatory. I think we are entitled to have some type of neutral reason.”

The court stated “I will find a prima facie case and ask for information.” The prosecution then responded: “With regard to juror 3, when questioned about her prior jury experience, she – the way she answered with respect to what the charges were was – she didn’t really remember, but then she said, well, maybe, but then she didn’t remember. It was like she didn’t pay attention and it wasn’t that long ago, five, maybe six years ago. Several other jurors had jury experiences much longer ago and they didn’t have a problem remembering that. That was part of my reason. [¶] The other part of my reason is, frankly, her orange hair color which indicates to me she is not really one to conform with others. I don’t think she will get along well with the other jurors or be able to agree with them.”

The court then ruled as follows: “I am satisfied on both of those grounds that is a race neutral reason for the challenge, and the motion is denied. She will be excused.”

On appeal, Ware argues that the trial court abused its discretion by rejecting his objection to the prosecution’s peremptory challenge of prospective juror 3. We disagree.

Under *Batson v. Kentucky* (1986) 476 U.S. 79, and *People v. Wheeler* (1978) 22 Cal.3d 258, “[b]oth the federal and state Constitutions prohibit any advocate’s use of peremptory challenges to exclude prospective jurors based on race.” (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) In determining the merits of a criminal defendant’s *Wheeler/Batson* objection, the trial court follows a three-step procedure: “First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]” (*Lenix, supra*, 44 Cal.4th at pp. 612-613.) At the third step, the trial court seeks to determine only whether the prosecutor’s proffered reasons are nondiscriminatory and genuine (as opposed to pretextual). “The justification need not support a challenge for cause, and even a ‘trivial’ reason, if genuine and neutral, will suffice. [Citations.]” (*People v. Arias* (1996) 13 Cal.4th 92, 136.) “[T]he issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible.” (*Lenix, supra*, 44 Cal.4th at p. 613, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.)

“Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions.” (*Lenix, supra*, 44 Cal.4th at p. 613.) “We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “with great restraint.” [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and

reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]” (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Ware argues, however, that in this case there are two reasons why our review should not be deferential. First, he argues that the trial court made no explicit finding that the prosecutor’s reasons were genuine, so “there is simply nothing for this court to defer to.” Ware cites no authority for the proposition that because the court did not make an express finding of genuineness, the court’s ruling is not entitled to deference. We are aware of none, and relevant Supreme Court case law suggests the proposition is incorrect. For example, in *People v. Ervin* (2000) 22 Cal.4th 48, the Court described the trial court’s ruling on a *Wheeler/Batson* motion as follows: “[T]he court denied defendant’s motion, expressly finding that the prosecutor’s explanations were ‘reasonably specific and neutral’ and sufficiently related to the case, and that defendant demonstrated no prosecutorial ‘group bias.’” (*Id.* at p. 74.) The Court gave no indication that the trial court made an express finding of genuineness, but the Court still reviewed the ruling with the customary deference. (*Id.* at pp. 74-75.)

In *Ervin*, as in this case, the trial court’s denial of the defendant’s motion includes an implicit finding of genuineness. Like the Supreme Court, we will therefore apply the usual deferential standard of review to that finding.

Second, Ware argues that “[t]he reasons the prosecutor gave for striking [p]rospective [j]uror 3 suffered from several facial defects that should have alerted the trial court to the need for more careful consideration of their authenticity.” In particular, Ware argues that (1) the prosecutor mischaracterized the colloquy concerning prospective juror 3’s prior jury experience, (2) the prosecutor overstated the extent to which prospective juror 3’s failure to remember the charges in the case in which she had previously served distinguished her from other prospective jurors, and (3) reference to prospective juror 3’s hair color as a reason for challenging her was “specious on its face.” On the basis of those alleged problems, Ware argues that the trial court was obligated to

make more detailed findings concerning genuineness, and that the court's failure to do so means that the court's ruling is not entitled to deference. We are not persuaded.

When referring to prospective juror 3's failure to remember the charges at issue in her previous jury service, the prosecutor said "[prospective juror 3] didn't really remember, but then she said, well, maybe, but then she didn't remember." In fact, prospective juror 3 first said she did not remember the charges. Second, she was asked *whether she remembered* if they were drug related, and she answered "No." Third, she was asked "No, they were not?", and she answered "No, they were not." As Ware acknowledges, the second question and answer were ambiguous, and the prospective juror's answer could reasonably have been interpreted as meaning that she did not remember whether the charges were drug related. If the prosecutor heard the answer that way, then the third answer could have sounded like prospective juror 3 was changing her story—first she said she did not remember whether they were drug related, but then she said she did remember they were not. In describing this exchange later, the prosecutor mixed up the temporal order, saying that the prospective juror "said, well, maybe, but then she didn't remember." There is no reason why this trivial error, if the trial court was aware of it, should have indicated to the trial court that more detailed findings on genuineness were necessary.

The prosecutor also said that "[s]everal other jurors had jury experiences much longer ago and they didn't have a problem remembering that," but Ware points out that only one (rather than several) of the prospective jurors who had undergone voir dire at that point fit the prosecutor's description (i.e., had served on a jury longer ago than prospective juror 3 but remembered the charges). Again, there is no reason why the trial court should have seen this trivial error as a red flag. The prosecutor's point was that prospective juror 3's prior service was not very long ago but she could not remember the charges. The point is strengthened by the presence in the jury pool of another juror who served longer ago but did remember the charges. The point is not undermined by the absence of additional jurors who fit that description.

The prosecutor also adverted to prospective juror 3's orange hair. Contrary to Ware's assertion, this reason is not "specious on its face." As already noted, even "trivial" reasons can be sufficient as long as they are genuine and race-neutral. (*People v. Arias, supra*, 13 Cal.4th at p. 136.) Moreover, hairstyle has been recognized as a sufficient reason, as long as the particular hairstyle is not peculiar to a particular race. (See *People v. Wheeler, supra*, 22 Cal.3d at p. 275; *Purkett v. Elem* (1995) 514 U.S. 765, 769.) Again, this should not have been a red flag for the trial court.

In sum, we are not persuaded by any of Ware's arguments for the conclusion that the trial court's ruling on his *Wheeler/Batson* motion is entitled to less than the customary degree of deference. Accordingly, we apply the deferential standard of review described *ante*.

On the merits, the heart of Ware's argument is a comparison of the prosecution's treatment of prospective juror 3 with the prosecution's treatment of other prospective jurors. Ware did not present such a comparative analysis to the trial court.

California law on the permissibility of undertaking comparative juror analysis for the first time on appeal has recently changed. Previously, it was prohibited: "When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal" (*People v. Johnson* (2003) 30 Cal.4th 1302, 1325.) Earlier this year, however, the California Supreme Court eliminated that prohibition. Because "comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination," "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons." (*Lenix, supra*, 44 Cal.4th at p. 622.) The Court emphasized nonetheless that "comparative juror analysis on a cold appellate record has inherent limitations. [Citation.]" (*Ibid.*) Moreover, "appellate review is necessarily circumscribed. The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment. Further, the trial court's finding is reviewed on the record as it

stands at the time the *Wheeler/Batson* ruling is made. If the defendant believes that subsequent events should be considered by the trial court, a renewed objection is required to permit appellate consideration of these subsequent developments.” (*Lenix, supra*, 44 Cal.4th at p. 624.)

Ware does not claim that he renewed his *Wheeler/Batson* objection in the trial court on the basis of developments that took place after the court denied his motion. Accordingly, our review is limited to (1) the comparisons identified by Ware that (2) derive from portions of the voir dire that had occurred before the trial court denied his motion.

Ware points out that before prospective juror 3 was excused, two other prospective jurors said they had previously served on juries but failed to identify the subject matter of their cases.¹ According to Ware, the prosecutor’s failure “to test their recollection” casts doubt on her sincerity in relying on prospective juror 3’s lack of recollection as a reason for excusing her. We disagree. In each of those instances, the prospective jurors were questioned by the court, not by the prosecution. That is, the court asked prospective juror 3 if she could remember the charges in the case in which she had previously served, but the court did not ask that question of the other two prospective jurors. The prosecution’s failure to follow up on the court’s questioning on that point does not indicate bias. The court’s questioning of prospective juror 3 revealed information that suggested to the prosecutor that prospective juror 3 might be inattentive; the court’s questioning of the other two prospective jurors did not. It is possible that the prosecutor’s observation of the other prospective jurors’ other responses, demeanor, or other nonverbal cues convinced her that they would not be inattentive, thus obviating the need for follow-up questioning on the issue. Given both the “inherent limitations” of “comparative juror analysis on a cold appellate record” (*Lenix, supra*, 44 Cal.4th at p. 622) and the deference to which the

¹ The prosecutor ultimately exercised a peremptory challenge to one of those two prospective jurors, perhaps because he expressed the belief that the drug laws are too strict.

trial court's ruling is entitled, we conclude that the prosecution's failure to pursue such a line of questioning does not show the trial court's ruling was not supported by substantial evidence.

Ware also argues that after learning that prospective juror 10 was in favor of legalizing the sale of drugs, the prosecutor "zeroed in on this issue" via follow-up questioning of other prospective jurors, revealing that several others felt some degree of ambivalence or opposition to the drug laws. On that basis, Ware argues that the prosecutor's professed concern about prospective juror 3's lack of recollection of the charges in her previous case seems to have been pretextual—the prosecutor followed up vigorously on issues that actually concerned her (such as attitudes toward the drug laws), but she did not follow up with other prospective jurors who had previously served on juries to find out whether they remembered what their cases were about. We are not persuaded. The charges in this case were possession and sale of illegal drugs. It was natural and reasonable for the prosecutor to have been acutely concerned about prospective jurors' attitudes to the drug laws, and the only way to find out about those attitudes was to ask. Although it was also natural and reasonable for the prosecutor to have been concerned about prospective jurors' attentiveness, we have already explained that the prosecutor could have obtained information on that issue in any number of other ways, such as the prospective jurors' nonverbal behavior or responses to other questions. Again, it was the court, not the prosecutor, who chose to ask prospective juror 3, but not certain other prospective jurors, about her recollection of the charges in her previous case. Prospective juror 3's answer conveyed to the prosecutor that prospective juror 3 was inattentive. In order to get a sense of the other prospective jurors' attentiveness, the prosecutor did not have to pose that specific question to each of them—she could have learned about it in numerous other ways.

The remaining portions of Ware's comparative juror analysis concern developments subsequent to the trial court's ruling on the *Wheeler/Batson* motion. They are therefore beyond the scope of our review. (*Lenix, supra*, 44 Cal.4th at p. 624.)

For all of the foregoing reasons, we reject Ware’s challenge to the trial court’s denial of his *Wheeler/Batson* motion.

II. The Admission of the Laboratory Report

Over defense objection, the trial court admitted evidence relating to laboratory reports (including the reports themselves) stating that the substances recovered from the buyer and the duffel bag contained cocaine. Ware argues that the admission of that evidence violated his rights under the Confrontation Clause because the criminalist who prepared the reports did not testify. Ware raises this argument only to preserve it, however, because he concedes that “this argument has been foreclosed in California by the decision of the California Supreme Court in *People v. Geier* (2007) 41 Cal.4th 555.” We agree that under current California law the argument is foreclosed.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.